



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 21, 1996

Ms. Melissa Abshier
County Attorney
Matagorda County
1700 Seventh Street
Bay City, Texas 77414

OR96-2174

Dear Ms. Abshier:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 101836.

The County of Matagorda (the "county") received a request for information relating to "the County's Energy Conservation Contract" and the selection of Enershop, Inc. ("Enershop") for implementation of the program. Specifically, the requestor seeks the following information:

1. A copy of Enershop's Bid/Proposal relating to the Matagorda County, Texas . . . energy efficiency program;
2. Copies of all supporting information authored by Enershop;
3. Copies of all documents or supporting information relative to the evaluation and selection of Enershop's proposal, including any information authored by the County or consultants hired on behalf of the County; and
4. A copy of the actual signed contract documents with Enershop.

You have submitted copies of the requested information to this office for review and assert that the information is excepted from required public disclosure pursuant to sections 552.104 and 552.110 of the Government Code.

Pursuant to section 552.305, we notified Enershop of the request for information and of its opportunity to claim that the information at issue is excepted from required public disclosure. Enershop responded, arguing that the requested information is excepted from disclosure under

sections 552.104 and 552.110 of the Government Code.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect the purchasing interests of a governmental body, usually in competitive bidding situations prior to the awarding of a contract. Open Records Decision No. 593 (1991) at 2. Although governmental bodies that properly raise this exception may withhold bidding information while governmental officials are in the process of evaluating proposals, section 552.104 does not except bids or proposals from disclosure once the bidding is over and a contract is in effect. Open Records Decision Nos. 306 (1982), 184 (1978). Having reviewed the submitted information, it is evident that the county selected Enershop's proposal and has executed a contract with Enershop. Based on this information, we find that the county has no valid section 552.104 claim and may not withhold any of the requested information under this exception.

Enershop also claims that the requested information is excepted from disclosure pursuant to section 552.104. However, section 552.104 is not designed to protect the interests of private parties who submit information to a governmental body. Open Records Decision No. 592 (1991) at 8-9. Thus, Enershop's section 552.104 claim is without merit.

Both the county and Enershop assert that the requested information is excepted from disclosure under section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the commercial or financial information prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

Neither the county nor Enershop has demonstrated that releasing the requested information will impair the government's ability to obtain necessary information in the future. See, e.g., *Bangor Hydro-Elec. Co. v. United States Dep't of the Interior*, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment because "it is in the [submitter's] best interest to continue to supply as much information as possible"); *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed"). However, Enershop has established that substantial competitive harm would likely result from releasing the following information: 1) Enershop's proposal, with the exception of the resumes found in Section A; 2)

the proposal addenda and clarifications; 3) the project manual; and 4) the project plans (drawings). Accordingly, the county must withhold these four categories of information from disclosure pursuant to the commercial or financial information prong of section 552.110.

The remainder of the information, including the contract and the resumes contained in section A of the proposal, is not commercial or financial information protected by section 552.110. Enershop also contends that this information constitutes a trade secret and is, therefore, protected from disclosure under the first prong of section 552.110. Thus, we must consider whether the remainder of the information merits trade secret protection.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima*

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

Having considered Enershop's trade secret arguments, we conclude that the remainder of the information does not constitute a trade secret. Thus, this information, including the contract² and the resumes³ in Section A of the proposal, must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 101836

Enclosures: Submitted documents

cc: Mr. Joe Kaveski
Johnson Controls, Inc.
3021 West Bend Drive
Irving, Texas 75083
(w/o enclosures)

Ms. Cindy Wishert
Senior Account Executive
Enershop, Inc.
616 Woodall Freeway
Dallas, Texas 75202
(w/o enclosures)

²Contracts between governmental bodies and third parties are generally considered public information. See generally Open Records Decision Nos. 541 (1990), 514 (1988), 125 (1976).

³Open Records Decision No. 175 (1977) at 4 (resumes listing education and experience of employees do not fall within trade secret exception to Open Records Act).